

of negligence. The driver had exercised reasonable care.

"Few occurrences in human affairs, in retrospect, can be said to have been, in absolute terms, inevitable. Different conduct on the part of those involved in them almost always would have produced a different result. But the possibility of a different result is not the issue and does not represent the proper test for negligence. That test remains whether the plaintiff has proved that the defendant, who owed a duty of care, has not acted in accordance with reasonable care."<sup>7</sup> PL

#### Footnotes:

- <sup>1</sup> See [1999] NSWCA 341 at [13].
- <sup>2</sup> [2001] HCA 48 at [8].
- <sup>3</sup> [1999] NSWCA 341 at [17] citing *Stewart v Carnell* (1984) 2 MVR 147 at 151.
- <sup>4</sup> [1999] NSWCA 341 at [18].
- <sup>5</sup> *Ibid* at [16].
- <sup>6</sup> *Ibid* at [14].
- <sup>7</sup> [2001] HCA 48 at [13].

## Landmark Cerebral Palsy Judgment *Simpson v Diamond & Anor* [2001] NSWSC 925 (5 November 2001)

Whealy J has awarded the plaintiff, a 22-year-old woman severely disabled by athetoid cerebral palsy since birth, almost \$13 million in damages.

Dr Diamond, the mother's obstetrician, admitted liability on the eve of the trial and unsuccessfully pursued a cross-claim against St Margaret's Private Hospital.

The trial proceeded over 65 days and involved a full hearing of the obstetric issues. On the damages case the plaintiff's life expectancy was a crucial issue, which developed into a battle between the clinicians and the statisticians.

His Honour found from his overall assessment of the clinical material in relation to the "statistical starting point" that the plaintiff's probable span of remaining years was a further 51 years from age 22.

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## Insurers could have settled for less

### Janet Fife-Yeomans

DOCTORS' insurers could have settled the country's two biggest medical damages payouts for millions of dollars less if they had accepted settlement offers, it was revealed yesterday.

The nation's largest medical insurer, United Medical Protection, and the Australian Medical Association have warned that obstetricians could become uninsurable as a result of the record medical damages award of at least \$13 million to cerebral palsy victim Calandre Simpson, 22.

The *Australian* understands a settlement offer of closer to \$10 million had been rejected by UMP.

The case began in 1987, but it was not until the eve of the trial in March this year that UMP admitted liability on behalf of obstetrician Robert Diamond, who left Ms Simpson severely disabled through a botched forceps delivery.

Interest of about \$2 million and legal costs of at least \$1 million will be decided on Friday in the NSW Supreme Court. The second-highest payout, to Tom Lipovac, 23, who was left with brain damage after a mistake by his doctor, was \$7.58 mil-



Ms Simpson

lion in the ACT Supreme Court in 1998. Mr Lipovac's lawyers had offered to settle out of court four years earlier for \$2.2 million, but the doctor involved denied liability.

Medical ethicist Merrilyn Walton said the cases highlighted why hospitals and professional associations should work towards a mediation system whereby the patient and doctor were not enemies.

Doctors should be encouraged to be honest about mistakes and patients should be quickly compensated, said Ms Walton, associate professor of ethical practice at Sydney University's faculty of medicine and the former NSW Health Care Complaints com-

missioner. She said a US veterans hospital had shown such a risk-management policy worked after introducing it in 1987. "Their liability costs have dropped from being one of the high-risk hospitals to a very low risk," Ms Walton said.

Australian Plaintiff Lawyers Association national president Rob Davis said insurers typically waited until the last minute to admit liability or agreed to settle as a tactical manoeuvre. He said their conduct should be scrutinised by the courts.

AMA vice-president Trevor Mudge said society, not insurers, should pay for victims such as Ms Simpson.